State Government of Sarawak v Masa ak Nangkai & Ors and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(f)-5–02 OF 2016(Q), 01(f)-6–02 OF 2016(Q), 01(f)-8–02 OF 2016(Q) AND Q-01(f)-9–02 OF 2016(Q)

RAUS SHARIF CHIEF JUSTICE, SURIYADI, ZAINUN ALI, BALIA YUSOF AND JEFFREY TAN FCJJ

7 NOVEMBER 2017

Constitutional Law — Constitution — Acquisition of property — Respondents filed action in High Court claiming they were original title holders or native customary rights ('NCR') owners of lands within development area and never surrendered, abandoned, lost or waived their NCR rights — Whether appellants in breach of art 13 of the Federal Constitution by compulsorily acquired respondents' NCR lands without giving compensation — Federal Constitution art 13

Land Law — Customary land — Native customary rights — Respondents filed action in High Court claiming they were original title holders or native customary rights ('NCR') owners of lands within development area and never surrendered, abandoned, lost or waived their NCR rights — Whether consenting NCR owners/interveners had locus in present case — Whether it was proven that respondents' NCR lands were within development area — Whether s 8 of the Sarawak Land Code violated — Land Custody and Development Authority Ordinance (No 4 of 1981) ss 11 & 15 — Sarawak Land Code s 8

The occupants ('the consenting NCR owners/the interveners') of an area gazetted for development in Sarawak had agreed that their native customary rights ('NCR') lands be merged and consolidated for development. The consenting NCR owners then entered into a principal deed dated 3 September 2004 ('the deed') with the State Government of Sarawak ('the fourth appellant') and Pelita Holdings Sdn Bhd ('the second appellant'). The second appellant as trustee of the consenting NCR owners, entered into a joint venture agreement ('the JVA') dated 3 September 2004 with a joint venture company ie Tetangga Akrab Pelita (Pantu) Sdn Bhd ('the third appellant') incorporated by the second appellant and Tetangga Akrab Sdn Bhd. The area for development ('the development area') was a State Government sanctioned development project declared vide the Land Custody and Development Authority Order 2006 dated 8 August 2006 ('the development order'). In the present case, the respondent filed an action at the High Court claiming, inter alia, that they were the original title holders or NCR owners of the lands within the development

area and had never surrendered, abandoned, lost or waived their NCR rights. At end of the trial, the High Court found in favour of the respondent and consequently, the appellants were ordered to surrender the vacant possession of the respondents' NCR plots of land. The appellants' appeals were dismissed by the Court of Appeal, hence the present appeals. The respondents submitted that: (a) the interveners lost all interest in the NCR lands in dispute when they signed the deed and the JVA with the appellants, hence, interveners had no locus in the present case; (b) their NCR lands were within the development area or overlap it and that their NCR lands were located in the area delineated in red on the map annexed to the amended statement of claim, marked 'B' ('P3') ie the red area in an alternative map ('D75') tendered by the appellants; (c) the allusion to s 11(4) of the Land Custody and Development Authority Ordinance (No 4 of 1981) ('the Ordinance') was in breach of art 13 of the Federal Constitution ('the Constitution'); and (d) the JVA and the deed were invalid as the second and third appellants were non-natives, hence, s 8 of the Sarawak Land Code ('the Code') was violated.

Held, allowing the appellants' appeals without costs and setting aside the decisions of the High Court and the Court of Appeal:

(1) With no appeal having been filed by the respondents against the order of the Court of Appeal allowing the interveners to intervene, the respondents were thus prevented from raising the issue of locus before the present court (see para 32).

(2) With P3 being uncontroverted as regards the red area in D75, which identified the respondents' NCR lands to be on it, the court was satisfied that the red area in D75, supposedly unclaimed and unverified, were plots of NCR land owned by some of the respondents (see para 44).

(3) Since the respondents' NCR lands in the red area in D75 were acquired compulsorily by the appellants without any compensation, there clearly was a breach of their constitutional rights. In the circumstances, it was statutorily required for the court to order compensation be paid to the affected respondents pursuant to s 15(6) of the Ordinance. The compensation satisfied art 13 of the Constitution which provided that no one was to be deprived of property unless in accordance with law. Further, any usurpation of the function of the Minister was also conveniently avoided (see paras 52–55).

(4) The evidence showed that pursuant to s 9(1)(d) of the Code, the second appellant was deemed to be native with effect from 1 December 1995 whilst the third appellant was deemed to be native with effect from 3 September 2004. Based on the case of *Boustead Plantations Bhd & Anor v Kadam ak Embuyang & Ors and other appeals (suing on behalf of themselves and 163 other proprietors, occupiers, holders and claimants of Native Customary Rights (NCR) land situated at Sg Kelimut, Kanowit*

District also known as Block D1 in Kanowit District) [2015] 1 MLJ 546, the High Court judge in the present case had misdirected himself when he held that the JVA and the deed could not have valid retrospective effect. With the remedial action taken, and the second and third appellants being declared and deemed 'natives' retrospectively, the High Court was in error when it decided that the JVA and the deed were in contravention of s 8 of the Code. In short, the JVA and the deed were valid (see paras 59–60).

[Bahasa Malaysia summary

Penghuni-penghuni ('pemilik-pemilik HAAN yang memberi izin/pencelah-pencelah') kawasan yang diwartakan bagi pembangunan di Sarawak telah bersetuju bahawa hak tanah-tanah adat anak negeri mereka ('HAAN') digabungkan dan disatukan bagi pembangunan. Pemilik-pemilik HAAN yang memberi izin kemudiannya memasuki surat ikatan utama bertarikh 3 September 2004 ('surat ikatan') dengan Kerajaan Negeri Sarawak ('perayu keempat') dan Pelita Holdings Sdn Bhd ('perayu kedua'). Perayu kedua sebagai pemegang amanah pemilik-pemilik HAAN yang memberi izin, memasuki perjanjian usaha sama ('PUS') bertarikh 3 September 2004 dengan syarikat usaha sama iaitu Tetangga Akrab Pelita (Pantu) Sdn Bhd ('perayu ketiga') diperbadankan oleh perayu kedua dan Tetangga Akrab Sdn Bhd. Kawasan untuk pembangunan ('kawasan pembangunan') adalah projek pembangunan yang dipersetujui oleh Kerajaan Negeri diisytiharkan melalui Perintah Lembaga Pembangunan dan Lindungan Tanah 2006 bertarikh 8 Ogos 2006 ('perintah pembangunan'). Dalam kes ini, responden memfailkan tindakan di Mahkamah Tinggi dengan mendakwa, antara lain, bahawa mereka adalah pemegang-pemegang hakmilik asal atau pemilik-pemilik HAAN tanah tersebut dalam kawasan pembangunan dan tidak pernah menyerahkan, meninggalkan, kehilangan atau mengetepikan hak HAAN mereka. Pada akhir perbicaraan, Mahkamah Tinggi mendapati memihak responden dan akibatnya, perayu-perayu diperintahkan untuk menyerahkan milikan kosong tanah HAAN responden-responden. Rayuan-rayuan perayu-perayu ditolak oleh Mahkamah Rayuan, maka rayuan ini. Responden-responden berhujah bahawa: (a) pencelah-pencelah hilang kesemua kepentingan dalam tanah HAAN tersebut dalam pertikaian apabila mereka menandatangani surat ikatan dan PUS tersebut dengan perayu-perayu, maka, pencelah-pencelah tidak mempunyai locus dalam kes ini; (b) tanah HAAN mereka adalah dalam kawasan pembangunan tersebut atau bertindih dan bahawa tanah HAAN mereka adalah terletak di kawasan yang ditandakan merah pada peta yang dilampirkan kepada pernyataan tuntutan, ditandakan 'B' ('P3') iaitu kawasan merah pada peta alternatif ('D75') yang dimasukkan oleh perayu-perayu; (c) rujukan kepada s 11(4) Ordinan Lembaga Pembangunan dan Lindungan Tanah (No 4 Tahun 1981) ('Ordinan') melanggar perkara 13 Perlembagaan Persekutuan ('Perlembagaan'); dan (d) PUS dan surat ikatan adalah tidak sah

kerana perayu kedua dan ketiga bukan anak negeri, maka s 8 Kanun Tanah Sarawak ('Kanun') dicabuli. A

Diputuskan, membenarkan rayuan-rayuan perayu-perayu tanpa kos dan mengenepikan keputusan Mahkamah Tinggi dan Mahkamah Rayuan: B

(1) Dengan tiada rayuan difailkan oleh responden-responden terhadap perintah Mahkamah Rayuan yang membenarkan pencelah-pencelah mencelah, responden-responden adalah oleh itu dihalang daripada membangkitkan isu locus di hadapan mahkamah ini (lihat perenggan 32). C

(2) Dengan P3 tidak menyangkal berkaitan kawasan merah pada D75, yang mana mengenal pasti tanah HAAN responden-responden berada di atasnya, mahkamah berpuas hati bahawa kawasan merah pada D75, kononnya tidak dituntut dan disahkan, adalah petak tanah HAAN yang dimiliki oleh sebahagian responden (lihat perenggan 44). D

(3) Memandangkan tanah HAAN responden-responden di dalam kawasan merah pada D75 diambil alih secara wajib oleh perayu-perayu tanpa apa-apa pampasan, jelas terdapat pelanggaran hak perlembagaan mereka. Dalam keadaan, ia adalah secara statutori mengkehendaki mahkamah untuk memerintah pampasan dibayar kepada responden-responden yang terjejas berikutan s 15(6) Ordinan. Pampasan memenuhi perkara 13 Perlembagaan yang mana memperuntukkan bahawa tiada sesiapapun boleh dinafikan terhadap hartanah tersebut kecuali mengikut undang-undang. Selanjutnya, apa-apa perampasan terhadap fungsi Menteri juga adalah mudah dielakkan (lihat perenggan 52–55). E F

(4) Keterangan menunjukkan bahawa berikutan s 9(1)(d) Kanun, perayu kedua dianggap adalah anak negeri berkuat kuasa dari 1 Disember 1995 sementara perayu ketiga dianggap adalah anak negeri berkuat kuasa dari 3 September 2004. Berdasarkan kes *Boustead Plantations Bhd & Anor v Kadam ak Embuyang & Ors and other appeals (suing on behalf of themselves and 163 other proprietors, occupiers, holders and claimants of Native Customary Rights (NCR) land situated at Sg Kelimut, Kanowit District also known as Block D1 in Kanowit District)* [2015] 1 MLJ 546, hakim Mahkamah Tinggi dalam kes ini telah salah arah dirinya apabila beliau memutuskan bahawa PUS dan surat ikatan tersebut tidak mempunyai kesan retrospektif yang sah. Dengan tindakan remedi yang diambil, dan perayu kedua dan ketiga diisytiharkan dan dianggap 'natives' secara retrospektif, Mahkamah Tinggi adalah salah apabila ia memutuskan bahawa PUS dan surat ikatan tersebut adalah bertentangan s 8 Kanun. Pendek kata, PUS dan surat ikatan tersebut adalah sah (lihat perenggan 59–60).] G H I

Notes

For cases on acquisition of property, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2435–2438.

For cases on native customary rights, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3473–3474.

Cases referred to

Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors [2013] 5 MLJ 149; [2013] 6 CLJ 805, FC (refd)

Boustead Plantations Bhd & Anor v Kadam ak Embuyang & Ors and other appeals (suing on behalf of themselves and 163 other proprietors, occupiers, holders and claimants of Native Customary Rights (NCR) land situated at Sg Kelimut, Kanowit District also known as Block D1 in Kanowit District) [2015] 1 MLJ 546, CA (folld)

Director of Forest, Sarawak & Anor v Tr Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, the occupiers, holders and the claimants of native customary rights (NCR) lands situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak) [2014] 1 MLJ 161; [2017] 3 CLJ 1, CA (refd)

Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241; [2001] 2 CLJ 769, HC (refd)

Nyalong v The Superintendent of Lands & Surveys 2nd Division, Simanggang [1967] 2 MLJ 249; [1967] 1 LNS 116 (refd)

Sapiah binti Mahmud (F) v Superintendent of Lands and Surveys, Samarahan Division & 2 Ors [2009] MLJU 410; [2009] 9 CLJ 567, HC (refd)

Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 72
Federal Constitution arts 3, 5, 13
Land Custody and Development Authority Ordinance ss 11, 11(1), (4), 15, 15(1), (2), (3), (4), (5), (6)
Sarawak Land Code ss 5, 5(1), (2), 8, 9, 9(1)(d)

Appeal from: Civil Appeal Nos Q-01–165 of 2011 and Q-01-(IM)-131 of 2011 (Court of Appeal, Putrajaya)

JC Fong (State Legal Counsel, Sarawak State Attorney General's Chambers); Sim Hui Chuang (Lim Lip Sze with him) (Reddi & Co) in Civil Appeal No 01(f)-5–02 of 2016(Q) for the appellant/fourth defendant.

JC Fong (State Legal Counsel, Sarawak State Attorney General's Chambers); Sim Hui Chuang (Lim Lip Sze with him) (Reddi & Co) in Civil Appeal No 01(f)-6–02 of 2016(Q) for the appellants/first, second and third defendants.

Lim Swee Huat (SH Lim & Co Advocates) in Civil Appeal Nos 01(f)-8–02 of 2016(Q) and Q-01(f)-9–02 of 2016(Q) for the appellant/intervener.
Dominique Ng (Dominique Ng & Assoc) in Civil Appeal Nos 01(f)-5–02 of 2016(Q), 01(f)-6–02 of 2016(Q), 01(f)-8–02 of 2016(Q) and Q-01(f)-9–02 of 2016(Q) for the respondents.

Suriyadi FCJ (delivering judgment of the court):

[1] The plaintiffs, hereinafter referred to as the respondents, filed a claim at the High Court at Kuching against Lembaga Pembangunan Dan Lindungan Tanah ('LCDA'), Pelita Holdings Sdn Bhd ('PHSB'), Tetangga Akrab Pelita ('Pantu') Sdn Bhd ('TAPSB'), and the State Government of Sarawak, respectively the first, second, third and fourth defendants (interchangeably referred to as the first, second, third and the fourth appellants or collectively as the appellants).

[2] The respondents won both at the High Court and the Court of Appeal, and hence the appeal before us by the appellants.

[3] The facts unravelled showed that within an area earmarked and gazetted for development, there were occupants (consenting NCR owners), who had agreed that their native customary rights ('NCR') lands be merged and consolidated for development. To put into effect that agreement, the consenting NCR owners then entered into a principal deed dated 3 September 2004 with the State Government of Sarawak ('the fourth appellant') and PHSB ('the second appellant'). For the development of the plots of land, the second appellant, as trustee of the consenting NCR owners, entered into a joint venture agreement ('the JVA') dated 3 September 2004 with a joint venture company ie the third appellant incorporated by the second appellant and Tetangga Akrab Sdn Bhd ('TASB'). TASB was not a party to this suit.

[4] The area for development, in short, was a state government sanctioned development project, described as the Sungai Tenggang NCR land development area ('the development area') declared vide the Land Custody and Development Authority Order 2006 dated 8 August 2006 ('the development order'). An oil palm plantation project was also undertaken, established and on-going in that development area.

[5] The development order was made under s 11(1) of the Land Custody and Development Authority Ordinance (No 4 of 1981) ('LCDA Ordinance'), and duly published in the Sarawak *Gazette* under SWK LN 79 dated 14 September 2006.

A **[6]** It must be borne in mind that the respondents were neither parties to the principal deed nor the JVA.

[7] In a nutshell, in the statement of claim, the respondents claimed that they were the original title holders or NCR owners of the lands within the B development area and had never surrendered, abandoned, lost or waived their NCR rights. There was also no prior or proper extinguishment of their rights according to law and no provision was made for any compensation to them. The respondents also alleged that the principal deed, the JVA and the activities on their NCR land were invalid.

C

[8] The respondents in their amended statement of claim prayed, inter alia, for a declaration that they were the original title holders or were the NCR land owners of the development area, that their arts 5 and 3 rights under the Federal Constitution had been violated, and that the actions of the first, second and D third appellants were ultra vires the Sarawak Land Code (in short the JVA with non-natives and the principal deed were void).

[9] In their defence, the appellants denied that the oil palm plantation project undertaken, established and on-going in the development area, had E encroached the respondents' alleged NCR land. The appellants put the respondents to strict proof of their alleged NCR rights.

[10] Before us, the appellants submitted that the respondents had no cause of action, as the NCR lands claimed by them were in fact unsurveyed state F land; that the alleged respondents' plots of land were virgin forest. The effect of this submission is that the appellants denied the respondents' ownership of any NCR land in the development area. In sharp contrast, the consenting NCR landowners' plots of land were within the development area, and had been duly surveyed, verified and properly documented. G

[11] Furthermore, this government sanctioned project was lawful, as apart from the development being carried out with the sanction and approval of the fourth appellant and the consenting NCR owners, the respondents also knew H of it, and thus denied of any violation of their rights under the Federal Constitution.

[12] The appellants submitted in the course of the appeal that the NCR lands were immediately amalgamated, and that titles were to be issued in the I name of the joint venture company, without the participating landowners having any legal and/or beneficial interest on the titles.

[13] After a full trial, the High Court allowed this respondents' claim and ruled against the appellants on 18 February 2011. The High Court held that

the respondents were entitled to their claim to lands under NCR in the development area, that the destruction of the respondents' NCR lands by the appellants was unlawful, and accordingly ordered damages to be assessed by the deputy registrar. The appellants were ordered to surrender vacant possession of the respondents' NCR plots of land. The appellants were also restrained from entering, occupying, clearing or in any way carrying out works in the respondents' NCR lands.

[14] Being dissatisfied with the decision of the High Court, the appellants (first, second and third appellants) appealed to the Court of Appeal vide Civil Appeal No Q-01-(IM)-131 of 2011. The fourth appellant filed a separate appeal vide Civil Appeal No Q-01–165 of 2011.

[15] At the Court of Appeal, the consenting NCR owners and participants of the development area ('the interveners'), totaling 361 people applied to intervene in the appeals. On 21 October 2011 the Court of Appeal granted leave to the interveners to participate in the appeals. The respondents did not appeal against the order of the Court of Appeal granting leave to the interveners.

[16] The interveners thereafter filed Civil Appeal No 01(f)-8 and 9–02 of 2016(Q). Regardless of their late entry in the appeal, as the issues posed by them are similar to those argued by the first, seond, third and fourth appellants, the interveners shall also be referred collectively as the appellants (and only referred to as *the interveners* when the need arises).

[17] On 29 December 2014 the Court of Appeal dismissed all appeals and affirmed the decision of the High Court. The Court of Appeal held in a nutshell that the respondents had been deprived of their NCR lands, which were sources of their livelihood, and had lost the rights to their property in direct violation of the Federal Constitution.

[18] The Court of Appeal opined that the JVA was also in contravention of s 8 of the Sarawak Land Code, as neither the second nor third appellants were declared natives, and that things invalid from the beginning could not be made valid by any subsequent act. That being so, the respondents were entitled to their claim to lands under NCR in the development areas. The Court of Appeal held that there was absolutely no legal basis for the first, second and third appellants to remain on the respondents' land and thus must vacate the same.

[19] Dissatisfied with the decision of the Court of Appeal, the appellants successfully applied for leave, on 14 January 2016, on the following questions of law:

Civil Appeals No 01(f)-5 and 6-02/2016(Q)

(a) Whether a Court is entitled to make an Order for delivery of vacant possession to some of the claimants of native customary land which is within a Development Area declared by the Minister under section 11 of the Land Custody and Development Authority Ordinance (No 4/81) (the Ordinance) to be developed thereunder.

(b) Where a native, whose native customary land is within a Development Area declared under Section 11 of the Ordinance, but does not agree with the scheme of development thereunder, the proper order and/or legal remedy to be granted to him by the Court, ought to be a declaration that the Minister should acquire his Native Customary Rights under Section 15 of the Ordinance or exclude his land from the development area under section 11(4)?

(c) Whether section 11(4) of the Ordinance is in breach of Article 13 of the Federal Constitution?

(d) Whether section 72 of the Courts of Judicature Act 1964 could apply to a case where irregularity in the Judgment or proceedings in the lower Court arose from the trial Judge making injudicious, disparaging and offensive remarks against witnesses of one party and consequently, his impartiality has been raised as an issue before the Court of Appeal?

(e) Whether a Joint Venture Agreement to develop native customary land within a Development Area declared under Section 11 of the Ordinance is invalid and/or remains invalid due to contravention of Section 8 of Sarawak Land Code if:

(i) one of the parties thereto was a non-native at the date of such agreement; but

(ii) subsequently, declared or deemed a native pursuant to Section 9(1)(d) of the Land Code? and

(f) Does a plaintiff claiming to nullify a trust deed or a joint venture agreement for the development of native customary land within a Development Area declared under section 11 of the Land Custody Development Authority Ordinance (No 4/81) have to prove that he has native customary law within the development area?

Civil Appeal Nos 01(f)-8 and 9-02/2016(Q)

(1) Whether the Court can ignore the fact that the Applicants/Interveners are the landowners whose NCR land has been consolidated and declared a development area.

(2) Whether the Court had acted in breach of the rules of natural justice when ordering vacant possession of the said NCR land.

(3) Whether the Court can make a restraining Order against the first Appellant/Defendant who are Trustees of the Applicants/Interveners herein whose NCR land had been duly verified within the said

Development Area as declared by the said Development Order the validity of which has never been expressly adjudicated upon.

(4) Whether the Court can order the first Appellant/Defendant as the agent of the State Government of Sarawak to deliver possession of the said Development Area to the Plaintiffs/Respondents.

[20] A perusal of the notices of appeal to the Federal Court filed by the appellants show that they were appeals against the entire decision of the Court of Appeal for having affirmed the High Court's decision in respect of the respondents' claim.

[21] The crux of the questions relates to the issues of whether the respondents' alleged NCR lands were within the development area and whether the declaratory reliefs granted by the High Court were proper and legal having regard to ss 11(4) and 15 of the LCDA Ordinance. Furthermore, the leave questions require us to decide whether the principal deed and the JVA had violated s 8 of the Sarawak Land Code.

THE APPELLANTS' SUBMISSION

[22] The appellants submitted that there was no factual basis to support the grant of declaration by the High Court as the respondents did not possess any NCR land within the development area. Further, the LCDA Ordinance makes provisions for the Minister to exclude the respondents' NCR land from the development area if any, or to acquire the same with payment of compensation so as to enable the development of the development area to continue for the benefit of the interveners.

[23] The appellants also submitted that the onus was on the respondents to discharge the evidential burden to support their claims that they had NCR over their claimed lands within the development area. The appellants submitted that no cogent evidence was adduced by the respondents who thus failed to establish their case, let alone justified the granting of the declarations sought by them.

[24] It was not denied by the appellants that exh D75 (a map) showed that certain portions of the area *claimed* by the respondents of their NCR lands were situated within or overlapped with some portion of the development area, a concession arrived at after the development area was surveyed, and the individual lots identified and verified by the area headmen. Regardless of the concession, the appellants argued that none of the respondents succeeded in proving that they had any NCR land within the development area except for the first respondent. In short, mere assertion did not amount to proof of their NCR over the development area.

[25] It was also argued that the High Court's order granting vacant possession to the respondents pre-empted or impeded the exercise of the statutory powers conferred on the Minister under ss 11(4), 15(2), 15(3), 15(4), 15(5) and 15(6) of the LCDA Ordinance. The appellants argued that s 11(4) of the LCDA Ordinance does not involve extinguishment of the respondents' NCR land but rather, the alteration of the development area so that the respondents could be excluded therefrom for the benefit of the interveners.

[26] As regards the illegality of the principal deed and the JVA, the appellants submitted that the question argued by the respondents of whether the JVA was invalid, was due to the fact that the second and third appellants (PHSB and TAPSB respectively) were non-natives. The appellants denied this argument and replied that they were declared and deemed native pursuant to s 9(1)(d) of the Sarawak Land Code. Hence, no contravention of s 8 of the Land Code took place.

THE RESPONDENTS' SUBMISSION

[27] In reply, learned counsel for the respondents argued that the appellants were well aware that the establishment of the respondents' NCR land had been proved during the trial at the High Court, and also accepted by the Court of Appeal. In short, finding of facts were made by both courts. The respondents argued that the allegation of the appellants that their encroached area was outside the development area was baseless and untrue.

[28] It was argued by the respondents that neither were they consulted nor had they given their consent during the implementation of the oil palm project. In fact they were ignored when they raised their objections to the destruction of their properties.

[29] On the issue of the validity of the principal deed and the JVA, the respondents argued that these documents, which purported to confer rights or privileges over the NCR lands on persons, companies or corporation who were not natives of Sarawak, were deemed illegal and void under s 8 of the Sarawak Land Code. This argument was in response to the argument submitted by the appellants earlier.

[30] The respondents alleged that a breach of s 8 of the Sarawak Land Code was further compounded when on 6 January 2010, by a deed of agreement dated 6 January 2010, TASB transferred 60% of its shareholding in TAPSB ('the JV company') to Kim Loong Corp Sdn Bhd, which was not a native of Sarawak. The JV company only became a native on 27 September 2007 three years after the oil palm project started. The respondents submitted that there was thus a contravention of the LCDA Ordinance. (Note: even though the

statement of claim was filed on 3 March 2005 and amended on 21 June 2006, the respondents never re-amended their amended statement of claim to include the above transfer of the 60% shareholding in TAPSB to Kim Loong. As parties are bound by their respective pleadings we refrain from delving into this issue.)

[31] The respondents also challenged the locus of the interveners, suggesting that they lost all interest in the NCR lands in dispute when they signed the principal deed and the JVA, with the first, second, third and fourth appellants. By executing the documents, the interveners vested and/or assigned all their rights over the NCR lands to the second appellant, who now is the beneficial owner and trustee of the NCR lands. The respondents submitted that the Court of Appeal thus erred in allowing the interveners to intervene.

[32] We find this argument quite perplexing, as, if the principal deed and the JVA were allegedly invalid, surely the interveners could not have lost their rights? With no appeal having been filed by the respondents against the order of the Court of Appeal allowing the interveners to intervene, the respondents were thus prevented from raising this issue of locus before us.

DECISION

[33] The Sarawak Land Code does not abrogate or extinguish the pre-existing NCR which existed prior to 1 January 1958, or impose a total ban on future creation of native customary rights. The phrase in accordance with the native customary law in s 5(1) of the Sarawak Land Code is a clear restatement of the law that the laws of Sarawak recognise NCR that existed prior to 1 January 1958.

[34] Section 5 of the Sarawak Land Code provides that until a document of title is issued, a native that has acquired NCR is deemed to be a licensee of the government. Under s 5(2) of the Sarawak Land Code, the underlying basis for the recognition of a particular NCR acquired lawfully is the occupation of and usage of land according to customary practices of the community or communities concerned. It was clarified in *Sapiah binti Mahmud (F) v Superintendent of Lands and Surveys, Samarahan Division & 2 Ors* [2009] MLJU 410; [2009] 9 CLJ 567, applying the principles laid down in *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241; [2001] 2 CLJ 769 that a claim under NCR to land is based on continuous occupation, though the occupation need not be actual occupation. *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509 (FC) affirmed that 'occupation' need not necessarily mean actual physical presence on the land.

[35] As long as the native has control over the land through supervision and continual visitation, that would suffice (*Director of Forest, Sarawak & Anor v Tr Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, the occupiers, holders and the claimants of native customary rights (NCR) lands situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak)* [2014] 1 MLJ 161; [2017] 3 CLJ 1).

[36] Under native custom, a native may abandon his NCR land or claim to the NCR land. A claimant who has acquired rights over the NCR land, but allowed without objection, the use of the land by others, is held to have abandoned any customary rights which he may have acquired either by himself or in any other manner over the land (*Nyalong v The Superintendent of Lands & Surveys 2nd Division, Simanggang* [1967] 2 MLJ 249; [1967] 1 LNS 116).

[37] In order for the respondents here to successfully establish their alleged NCR, as described in their statement of claim, it was imperative for them to establish first that these NCR lands were within the development area or overlap it.

[38] According to para 4(a) of the amended statement of claim, the respondents pleaded that their NCR lands were located in the area delineated in red on the map annexed to the amended statement of claim, marked B. It is trite law that litigants, in this case the respondents, are bound by their pleadings, and without more the alleged NCR lands must be those shown in Map B.

[39] It was the factual finding of the High Court that the respondents were entitled to their claim to NCR lands in the development area. As said above, this finding was also accepted by the Court of Appeal.

[40] As we needed to arrive at our own finding, we sifted the evidence adduced before the trial court to decide whether the respondents had discharged the burden of proof that their lands were included in the development area, and also succeeded in establishing their NCR claims. PW8 (Nicholas Mujah ak Asun), who gave evidence on behalf of the respondents, identified the claims of the respondents in Map B (P3). He testified that he was the person who prepared P3. In the course of the hearing he admitted being a social worker and had P3 prepared only after a request was made by the respondents.

[41] The appellants tendered an alternative map ie D75 (prepared by a neutral licensed map maker). It revealed that certain portions of the respondents' *claimed* NCR lands were indeed located within the development area. The development area was surveyed, and the individual lots within it were

identified and verified by the map maker. This map which was of great help to the interveners' claim over their respective NCR lands, as it confirmed their ownership, but unfortunately failed to establish the 360 respondents as owners of any NCR land within that area.

[42] From the evidence adduced by both parties, we are satisfied that the appellants had successfully established the interveners as verified owners of identifiable lots in the development area as shown in the enlarged map of D75, shaded in yellow.

[43] The matter did not end there. It surfaced in the course of the hearing, as per the evidence of DW20 (Abdullah Chek), that there were in existence pockets of areas of unclaimed lots with no verified owners in the development area, as highlighted in D75 shaded in red.

[44] Having sifted all the evidence, in particular with P3 being uncontroverted as regards the red area ('the red area in D75'), which identifies the respondents' *claimed* NCR lands to be on it, we are satisfied that the *red area in D75*, supposedly unclaimed and unverified, were plots of NCR land owned by some of the respondents.

[45] Even though the issue of the development order was never pleaded by the respondents, it is incumbent upon us to decide on its legality, as the substratum of the whole project in the development area is that development order dated 8 August 2006.

[46] The development order was made pursuant to s 11(1) of the LCDA Ordinance, which reads:

> 11(1) Where it appears to the Minister ... the Minister may by order in the Gazette declare such area of land (whether alienated land, unalienated land or Native Customary Land) to be a Development Area ...

[47] The appellants in anticipation of this issue, in their written submission (para 2.1) also submitted that this development order was never challenged. Having considered the pleadings and the evidence we hold the view that the development order is valid.

[48] Section 11 of the LCDA Ordinance in short empowers the Minister to declare an area as a development area and determine its extent. Furthermore, under s 11(4) of the LCDA Ordinance the Minister may at any time by order in the *Gazette* alter, replace or extend any development area. The Minister thus may exclude or add land to an existing development area.

[49] For purposes of this appeal, s 11 of the LCDA Ordinance cannot be read in isolation but read together with s 15(1) of the same Ordinance. It reads:

> 15(1) Where it is not possible to develop any land by arrangement or agreement with the owner, the Authority may, with the approval of the Minister, acquire such land by compulsory acquisition for purpose of carrying out any of its functions under this Ordinance.

[50] Section 15(6) of the LCDA Ordinance provides that compensation shall be payable by the Authority in respect of any land compulsorily acquired under sub-s (1). Thus, s 15 of the LCDA Ordinance apart from providing for compulsory acquisition, also provides a mechanism of payment of compensation to the landowners.

[51] Nevertheless, it was alleged by the respondents that the allusion to s 11(4) of the LCDA was found to be in breach of art 13 of the Federal Constitution by the Court of Appeal. For ease of reference we reproduce art 13 of the Federal Constitution, and it reads as follows:

> 13 Rights to property
>
> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[52] In order to establish that a breach under art 13 of the Federal Constitution has taken place, it must be shown that there was compulsory acquisition of the NCR lands without compensation, or was inadequate. Earlier at para 44 we made a finding of fact that the *red area in D75* (coincidentally of the same colour as in the respondents' amended statement of claim) is owned by some of the respondents, and subsequently acquired by compulsory acquisition for development. And it is a fact that the affected respondents were not compensated for the acquisition of those lots in the *red area in D75*. Since the respondents' NCR lands in the *red area in D75* were acquired compulsorily by the appellants without any compensation, there clearly was a breach of their constitutional rights. That has to be righted.

[53] In the circumstances of the case, with the *red area in D75* having been compulsorily acquired under s 15(1) of the LCDA Ordinance for development, and the respondents remaining uncompensated, we hold the view that it is statutorily required that we order compensation be paid to the affected respondents pursuant to s 15(6) of the LCDA Ordinance (see *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149; [2013] 6 CLJ 805). For purposes of identifying and compensating the rightful NCR owner, an inquiry needs to be held by the authority concerned.

[54] This solution of compensating the rightful NCR owner not only allows the development of the palm oil project to continue uninterrupted but compensates the respondents, and thus circumvent any breach of art 13 of the Federal Constitution. The compensation satisfies art 13's demand that no one is to be deprived of property unless in accordance with law, and such law having provision for adequate compensation in the event of any property being compulsorily acquired.

[55] Any usurpation of the function of the Minister is also conveniently avoided, unlike the order of the High Court which ordered delivery of vacant possession to the respondents despite the advance stage of the oil palm project.

[56] We now discuss the legality of the JVA and the principal deed. As mentioned at paras 29–30 above, the respondents ventilated that these two documents were invalid as the second and third appellants were non-natives. In short s 8 of the Sarawak Land Code was violated.

[57] Section 8 of the Sarawak Land Code states:

> 8 Save as provided in section 9 —
>
> (a) A person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land, Native Customary Land or Interior Area land;
>
> ...

[58] Section 9 of the same Code states:

> 9 Acquisition of land by non-natives
>
> (1) Section 8 shall not be deemed to prohibit the acquisition by any non-native of any land to which the provisions of that section apply, or for any rights or interest in or over such land —
>
> (a) ...
>
> (b) where such non-native has been deemed to be a native, by the Majlis Mesyuarat Kerajaan Negeri, by notification in the Gazette, in respect of any category of dealing over Native Area Land as stipulated in the notification.

[59] The evidence showed that pursuant to s 9(1)(d) of the Sarawak Land Code, by notifications in the *Gazette*, the second appellant was deemed to be native with effect from 1 December 1995 whilst the third appellant was deemed to be native with effect from 3 September 2004. We hold that the High Court judge had misdirected himself when he held that the JVA and the principal deed could not have valid retrospective effect. We find support in the case of *Boustead Plantations Bhd & Anor v Kadam ak Embuyang & Ors and other appeals (suing on behalf of themselves and 163 other proprietors, occupiers, holders*

and claimants of Native Customary Rights (NCR) land situated at Sg Kelimut, Kanowit District also known as Block D1 in Kanowit District) [2015] 1 MLJ 546 where the Court of Appeal at pp 65–66 opined that:

> [31] We were in agreement with the submissions of learned counsel Datuk JC Fong for the State that the *gazetted* Directions (D2 and D3) in so far as it deemed PHSB and JVC as natives had validity retrospectively. Firstly, the prohibitions vide s 8 were expressly subject to the provisions of s 9 and, secondly, there was nothing in s 9(1)(d) which stipulated that the notification thereunder was only to have effect prospectively.

[60] With the remedial action taken, and the second and third appellants being declared and deemed natives retrospectively, the High Court was in error when it decided that the JVA and the principal deed were in contravention of s 8 of the Sarawak Land Code. In short, we find the JVA and the principal deed valid.

[61] We lastly undertake a brief discussion of the tenor and language used by the High Court judge in his grounds of judgment and decide whether his injudicious, disparaging and offensive remarks fell foul of s 72 of the CJA 1964. This provision reads:

> 72 No judgment or order of the High Court, or of any Judge, shall be reversed or substantially varied on appeal, nor a new trial ordered by the Court of Appeal, on account of any error, defect, or irregularity, whether in the decision or otherwise not affecting the merits or the jurisdiction of the Court.

[62] It is beyond dispute that the High Court judge had descended into the arena as reflected in the abrasive words used in his grounds of judgment against witnesses which raised an issue of probable impartiality. Such an inclination affects the evaluation of the evidence before the trial judge, his view on the credibility of the witnesses, and generally affects the dignity of the court. In the circumstances of the case, even though the unnecessarily harsh words do not fall under the phrase error, defect or irregularity, it is perhaps not inappropriate to remind judges to refrain from descending into the arena for fear of clouding his eventual judgment.

[63] In the circumstances of the case, and for the aforesaid reasons, we therefore allow the appellants' appeals without costs. We hereby set aside the decisions of the High Court and the Court of Appeal and substitute their orders in the following terms:

(a) the development order, principal deed and the JVA are found to be valid;

(b) the *red area in D75* is NCR land owned by some of the respondents;

(c) the authorities are to regularise the compulsory acquisition of the NCR

lands from the rightful owners in the *red area in D75*, if necessary;

(d) an enquiry is to be held in order to identify the rightful NCR owners in the *red area in D75;* and

(e) the rightful owners of the *red area in D75* are to be compensated by the authorities pursuant to s 15 of the LCDA Ordinance.

[64] Due to the nature of the appeals, and the way we have dealt with the matter before us, we find no necessity to answer the questions.

Appellants' appeals allowed without costs; decisions of High Court and Court of Appeal set aside.

Reported by Dzulqarnain Ab Fatar